ORIGINAL

STATE OF MICHIGAN
IN THE SUPREME COURT

In re Application of CONSUMERS ENERGY COMPANY
For Reconciliation of 2009 Costs.

TES FILER CITY STATION LIMITED PARTNERSHIP

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION AND ATTORNEY GENERAL,

Appellees.

Supreme Court No. 150395

Court of Appeals No. 305066

Michigan Public Service Commission
Case No. U-15675-R

150395

reply

REPLY BRIEF OF APPELLANT TES FILER CITY STATION LIMITED PARTNERSHIP RESPONDING TO THE BRIEF FILED BY APPELLEE ATTORNEY GENERAL

Respectfully submitted by

Dated: December 29, 2014

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I. INTRODUCTION

Two different Appellees filed briefs in response to TES's Application. Pursuant to MCR 7.302 (E) and 7.212(G), Appellant TES is filing a separate reply brief in response to each Appellee. This Reply Brief is directed only at the brief filed by the Attorney General ("AG"). Not surprisingly, there is some overlap between the arguments raised in the briefs filed by the two Appellees. To avoid needless duplication, Appellant TES will address each argument only once. Thus, arguments that both of the Appellees raise in their briefs will be addressed in only one of the Reply Briefs. With respect to such redundant arguments, Appellant TES hereby incorporates by reference the reply arguments set forth in its other Reply Brief.

II. ARGUMENT

A. TES'S APPEAL MERITS CONSIDERATION BY THIS COURT.

In his brief, the Attorney General ("AG") portrays this case as supposedly involving highly technical issues that affect only one party and will never arise again in any future dispute.[1] Based on these self-serving characterizations, the AG asserts that TES's Application does not demonstrate one or more of the grounds for granting leave to appeal under MCR 7.302(B). To dispel any such confusion regarding the merits of TES's Application, the following paragraphs summarize the reasons why this appeal merits review by the Court.

1. *The Split Decision Of The Lower Court Involves Matters Of Significant Public Interest.*

Beginning on page 2 of his brief, the AG asserts that "there is no reason to believe that the interpretation of this time-dependent statutory exception to limits on utility cost recovery will be disputed by anyone in the future." With all due respect, the AG knows that these allegations

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[1] AG's Brief at pp 2, 10, 26 & 33.

are false because he himself is already involved in four (4) other MPSC cases and three (3) other appeals where the same issue has arisen.[2]

Moreover, as of 2010, the interpretation of the word, "implemented" in MCL 460.6a(8) began impacting recovery of sulfur dioxide (SO2) allowance costs, as well as NOx allowance costs.[3] That is because the EPA implemented new SO2 regulations for the first time in 2010 based on a federal implementation plan that was promulgated in 2005.[4]

During the coming year, 2015, the phased-in implementation of other regulatory changes under the 2005 Clean Air Interstate Rule will begin to expose the BMPs to even more new limits on both SO2 and NOx emissions.[5] As these regulations are implemented and begin to affect the BMPs for the first time, the issue again will be the same question that is presented in this appeal; i.e., what did the Michigan Legislature intend when it drafted MCL 460.6a(8) to allow uncapped recovery of costs incurred due to regulatory changes ***implemented*** after October 6, 2008. As these new regulatory changes are implemented and the emissions limits become stricter, not only will more costs be at stake, but more parties will be affected.[6]

Because the misguided decision of the majority in the lower court's split decision will impact 4 other pending cases, 3 other pending appeals, and numerous future cases, directly affecting the rights and financial interests of multiple parties with respect to several different categories of costs, it should be clear that this case involves matters of significant public interest.

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[2] MPSC cases U-16045-R, U-16432-R, U-16890-R & U-17095-R. CoA dockets 314361, 316868 & 321877. There are multiple cases because Michigan law requires that these cost recovery cases be filed annually.

[3] *Id.*

[4] 70 Fed Reg 25162 (May 12, 2005).

[5] 70 Fed Reg 49721 (August 24, 2005).

[6] While TES is the only BMP whose size and operating characteristics triggered the need to purchase NOx allowances in 2009, it is likely that other BMPs may need to do so in the future as the EPA and MDEQ gradually implement stricter emission limits.

2. ***This Appeal Involves At Least Two Legal Principles Of Major Significance To The State's Jurisprudence.***

(a) **The majority's statement indicating that it is acceptable to simply disregard a key word in a statute directly violates a principle of statutory construction that is of major significance to the state's jurisprudence**.

One of the most important responsibilities of the judicial branch of government is to correctly interpret statutes enacted by the legislative branch. This Court has stated:

> "It is a cardinal rule of statutory construction that full effect shall be given to every part of the act under consideration. Every clause and **every word is presumed to have some force and meaning**." *Wyandotte Sav Bank v Eveland,* 347 Mich 33, 44; 78 NW2d 612 (1956) (internal citations omitted)(emphasis added).

In the instant case, this fundamental principle is being tested. Even though the Michigan Legislature specifically selected the word, "implemented", in MCL 460.6a(8), the majority below stated, "At issue in this case is not the meaning of the term "implemented", but rather on what date TES Filer was affected by the NOx emission rules."[7] Thus, faced with interpreting a statute wherein the Legislature expressly tied Appellant TES's rights to the date when certain regulatory changes were "implemented", the majority below stated that the meaning of the key word was not at issue. Instead of interpreting the statute as written, the majority below decided to interpret the statute as they thought it should have been written. In so doing, the majority violated the principle that every word in a statute must be presumed to have meaning. While the majority's later statements are inconsistent and contradictory, the above-quoted statement is noteworthy because it indicates that it is acceptable to simply disregard a key word in a statute. Such a statement in a published opinion should concern this Court because it directly violates a principle of major significance to the state's jurisprudence.

[7] Majority Opinion dated 9/25/14, attached as Appendix A to TES's Application, at p. 7 (emphasis added). If the issue is when TES was affected, it should be noted that TES was not affected by the rules until they were implemented in 2009.

(b) <u>The majority opinion in the lower court's split decision also constitutes a major departure from past precedent</u>.

As explained in TES's Application for Leave to Appeal, the unanimous view of federal and state courts has been that a document calling for action at a future date is deemed to be implemented when the action is actually carried out. The majority's opinion in the split decision below, however, has become the first ever published precedent standing for the unfounded proposition that a document embodying a plan for future action is deemed to be "implemented" when the plan is adopted, rather than when the plan is actually carried out. This novel precedent, if allowed to stand, could have important ramifications for a wide range of future cases involving questions related to the "implementation" of plans, rules, statutes, ordinances, contracts, orders, etc. Such a major departure from past precedent is a development of major significance to the state's jurisprudence.

3. *The Majority Opinion Below Demonstrates Such Clear Error And Material Injustice That It Cries Out For Peremptory Reversal*

Obviously, most of TES's Application for Leave to Appeal is devoted to explaining all of the reasons why the lower court's split decision is erroneous. All of those arguments need not be repeated here. The following individual errors, however, merit special attention.

(a) <u>The majority opinion below is internally inconsistent and contradictory</u>.

On page 7 of its decision, the majority asserts that the issue in this case is "on what date TES Filer was **affected** by the NOx emission rules." On the very next page, however, the majority contradicts itself and states, "We do **not** believe that any particular person or entity needs to feel the **effect** of a law or standard for it to be 'implemented'." The majority's two statements are simply inconsistent with each other. In the English language, a party that feels the **effect** of an action necessarily is **affected** by that action. In this case, TES was affected by the

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new NOx emission rules when it first felt the effect of those rules in 2009. In this regard, another important point is that rules or statutes calling for the future implementation of changes can be amended or repealed. Consequently, it is entirely possible that a rule can be promulgated, but never affect any parties because the rule is repealed before it is ever implemented.

(b) The majority below misstated the wording of the statute at issue.

At page 7 of its opinion, the majority below stated, "MCL 460.6a(8) compares the effective date of the statute and the date of any changes in state or federal environmental rules." This assertion is patently inaccurate. The statute (*i.e.*, MCL 460.6a(8)) clearly and unequivocally compares the effective date of 2008 PA 286 with the date when any regulatory changes are implemented, and not the date when the rules are changed. The Legislature could have created an exception to the statutory cap for costs incurred due to the ***promulgation or enactment*** of new rules or statutes after October 6, 2008, but, instead, the Legislature, being aware that existing rules were scheduled to be implemented over several years in the future, created an exception for costs incurred due to the ***implementation*** of regulatory changes.

(c) The majority below misstated the regulatory history of the rules at issue.

At page 7 of its opinion, the majority below stated that, "The NOx emission rules that were applicable to TES Filer did not change after October 6, 2008 . . . ." Contrary to the majority's assertion, it is a matter of public record that the MDEQ's 2007 rules were revised after that date. Specifically, on May 28, 2009, the MDEQ promulgated revisions to the 2007 rules.[8] Then, on October 19, 2009, the US EPA approved the revised rules as a package.[9] The majority's misunderstanding of the facts is of particular concern with respect to TES's second

[8] The revised rules were filed with the Secretary of State on May 28, 2009 and published in the Michigan Register at 2009 MR 10 – June 15, 2009.

[9] 74 Fed Reg 41638 (August 18, 2009). On this date, the EPA announced that its approval of the revised rules would be effective on October 19, 2009.

argument, which hinges on the fact that the MDEQ rules applicable to TES did, in fact, change after October 6, 2008 and the original unamended 2007 rules were an unenforceable nullity at the time when TES incurred its environmental costs.[10]

(d) <u>The majority below failed to distinguish, or even mention, the overwhelming precedent cited by TES and, instead, made up its own unique definition of the word, "implemented"</u>.

Of all the errors, omissions, contradictions and inconsistencies in the majority's opinion below, one of the most puzzling is why the 2 judges who wrote the opinion never even attempted to distinguish any of the multitude of state and federal court decisions wherein the word, "implemented", has been defined by numerous federal and state courts in the manner suggested by TES. Consistent with the doctrine of *stare decisis*, the majority should have at least attempted to explain why it chose to ignore all of the precedent holding, in numerous contexts, that a document embodying a plan for future action is not deemed to be "implemented" until the action is actually carried out.

In summary, the majority below contradicted itself, misstated important facts, misstated the governing statute, and ignored the relevant case precedent. In light of this panoply of significant errors, it should be no surprise that the majority also reached the wrong result in this case. To remedy these clear errors and prevent material injustice to TES and the others who will be substantially prejudiced by this adverse precedent in the future, the majority's decision should be peremptorily reversed.

B. THE ATTORNEY GENERAL HAS MISCHARACTERIZED TES'S POSITION AS TO WHAT CONSTITUTES "IMPLEMENTATION".

In his brief, the AG characterizes TES's position as "focusing on when TES complied with

[10] It would be necessary to reach TES's second argument only if the Court decides to reject TES's primary argument.

regulations" and argues that the MDEQ rules were implemented when they were promulgated "rather than when TES Filer City complied with them".[11] To avoid any confusion, it is important to emphasize that TES has never contended that its compliance with the rules caused the rules to be implemented. Implementation occurred when the rules became legally enforceable and imposed new emission limits on the generators that the rules describe as "newly affected". Even if, hypothetically, TES had failed to comply with the rules, the implementation date specified in the rules would have remained the same. Regardless of when or if TES complied with the rules, the rules were implemented on the date when the rules, for the first time, required newly affected generators to comply with the new regulations.[12]

C. THE MDEQ'S 2007 RULES WERE NOT INDEPENDENTLY EFFECTIVE UNDER STATE LAW BECAUSE THEY WERE, BY THEIR OWN TERMS, AN UNENFORCEABLE NULLITY UNTIL THEY WERE APPROVED BY THE EPA.

In addition to its principal argument regarding the meaning of the term, "implemented", TES has presented an alternative and independently sufficient basis for deciding this appeal based on the fact that the MDEQ rules were, by their own terms, an unenforceable nullity until they were approved by the EPA. In his brief to this Court, the AG argues that the MDEQ's unrevised 2007 rules were independently effective under state law even without EPA approval. The AG contends that EPA approval simply made the rules enforceable as a matter of federal law.[13] The AG's arguments in this regard completely miss the point that the state rules were ineffectual **as a matter of state law** because, by their own terms, they were an unenforceable nullity until they were approved by the EPA.

[11] AG's Brief at pp 14 & 20.

[12] On the implementation date in 2009, the rules applied to all of the BMPs, but, due to TES's size and operational characteristics, TES was the only BMP that was required to purchase NOx allowances that year.

[13] AG's Brief at pp. 7 & 27-30.

As explained in more detail in TES's Application for Leave to Appeal, the MDEQ's 2007 rules provided that newly affected generators that produced more than a specified amount of NOx emissions must purchase "CAIR NOx allowances". Importantly, those allowances were specifically defined as being authorizations issued "under the provisions of a State implementation plan that are approved [by the EPA]".[14] At the time when TES purchased its NOx allowances, the unamended 2007 rules had been disapproved by the EPA. This disapproval made it impossible to purchase "CAIR NOx allowances" under the 2007 version of the MDEQ's State Implementation Plan because the Plan was not approved by the EPA. It is simply not possible to buy something that does not exist. By the time that TES purchased its NOx allowances, the unamended 2007 rules had been disapproved and a new set of revised rules consisting of a blended combination of the 2007 rules and related 2009 revisions had been jointly approved by the EPA as a package. Thus, TES did not incur its costs "due to" the unamended 2007 rules. As Mr. Tondu testified at the hearing in this case, TES incurred its NOx costs due to the revised 2009 rules.[15]

The AG's contention that the EPA's approval served only to make the state rules enforceable under federal law ignores the fact that the state implementation plan was, **by its own terms**, an ineffectual nullity until the EPA approved it. The AG attempts to avoid this fact by noting that the federal definition of a "CAIR NOx allowance" also includes allowances "issued by a permitting authority or the Administrator under subpart EE of this part or §97.188". The fatal flaw in the AG's argument is the fact that TES did not purchase its NOx allowances under subpart EE or section 97.188 of the federal regulations, but rather under the terms of the

[14] R 336.1803(3), incorporating by reference 40 CFR 97.102 (emphasis added).
[15] 2 Tr. 166, 176, & 178-180.

MDEQ's State Implementation Plan. Moreover, the provisions cited by the AG were not even applicable to TES, so those references are irrelevant.[16]

TES purchased its allowances under the terms of the MDEQ's State Implementation Plan wherein the MDEQ established its own allocation formulae related to NOx emissions in the State of Michigan. As specifically defined in the state rules, no allowances could be issued under the State Implementation Plan unless and until it was approved by the EPA. Thus, TES purchased its NOx allowances in 2009 "due to" the MDEQ's revised rules, as approved by the EPA in 2009.

III. RELIEF REQUESTED

For the reasons set forth above, Appellant TES Filer City Station, L.P. hereby respectfully requests that this Honorable Court grant the relief described in its Application for Leave to Appeal.

Respectfully submitted,

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[16] 40 CFR 97.188 applies to "opt-in units". TES is not an opt-in unit. Subpart EE of Part 9 applies to allowances issued by the EPA Administrator in the absence of an approved State Implementation Plan.